No. 20-994

IN THE

Supreme Court of the United States

VOLKSWAGEN GROUP OF AMERICA, INC., et al.,
Petitioners,

v.

THE ENVIRONMENTAL PROTECTION COMMISSION OF HILLSBOROUGH COUNTY, FLORIDA, AND SALT LAKE COUNTY, UTAH,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF INTERNATIONAL ORGANIZATION OF MOTOR VEHICLE MANUFACTURERS, EUROPEAN AUTOMOBILE MANUFACTURERS' ASSOCIATION, AND EUROPEAN ASSOCIATION OF AUTOMOTIVE SUPPLIERS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are trade associations that serve the global automotive industry. International Organization of Motor Vehicle Manufacturers ("OICA") is a world association founded in 1919 whose members are 36 national/regional trade associations, representing all major automobile manufacturing countries in Europe, America, and Asia. It includes member trade associations that represent large exporters to U.S. markets, including among others Japan Automobile Manufacturers Association ("JAMA"), Germany's Verband der Automobilindustrie ("VDA"), Korea Automobile Manufacturers Association ("KAMA"), Italy's Associazione Nazionale Filiera Industria Automobilistica ("ANFIA"), and the United Kingdom's Society of Motor Manufacturers and Traders ("SMMT"). The European Automobile Manufacturers' Association ("ACEA") is also a member.

OICA is the only non-governmental car and truck manufacturers' organization accredited to the United Nations, and OICA represents the technical interests of its members before international institutions and organizations. It coordinates the global harmonization of vehicle regulations. The member national associations are committed to the improvement of road safety and environmental protection, and they actively

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[1] Pursuant to Supreme Court Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici* and their counsel made any monetary contribution toward the preparation and submission of this brief. The parties were provided with timely notice of *amici*'s intent to file this brief pursuant to Rule 37.2(a). Petitioners filed a blanket consent to the filing of *amicus curiae* briefs and respondents have consented to the filing of this brief.

contribute to the global harmonization of technical regulations and standards.

The European Automobile Manufacturers' Association ("ACEA") is the trade association that represents the 15 major European-based car, van, truck, and bus makers. ACEA's activities include defining and advocating the common interests, policies, and positions of the European automobile industry. ACEA also engages in dialogue with the European institutions and other stakeholders in order to advance understanding of industry-related issues and to contribute to effective policy and legislation at both European and global levels, and acts as a portal for expert knowledge on vehicle-related regulation.

The European Association of Automotive Suppliers ("CLEPA"), founded in 1959, is the voice of European automotive suppliers, representing more than 3,000 companies that supply all products and services within the automotive supply chain. Its mission includes supporting the European Union and UN decision-making process and shaping the legislation impacting the automotive business; being a credible partner for the EU institutions and the UN authorities; and ensuring coherent and consistent development of international trade and global technical harmonization.

This case is significant to *amici* because the global automotive companies that they represent are substantial suppliers of vehicles and vehicle components to U.S. markets. The manufacturers make post-sale updates to their products as a routine part of their business. With respect to vehicle emission systems, *amici* and their members have relied on the longstanding U.S. policy that the United States Environmental Protection Agency ("EPA") is the

exclusive regulator of such post-sale updates.[2] Under the Ninth Circuit's decision, however, the manufacturers will face the prospect of regulation and enforcement actions by thousands of state and local governments, which may impose conflicting requirements based on unpredictable local preferences and priorities.

This lack of national uniformity would be unprecedented in *amici*'s experience. If allowed to stand, the decision below will create intolerable risks and boundless potential liability for vehicle manufacturers, confusion and harm to U.S. consumers who will pay the increased costs generated by uncertainty, and adverse impacts on international trade—without any clear countervailing benefit to environmental protection. For all of these reasons, *amici* have a substantial interest in this Court granting review of the decision below.

SUMMARY OF ARGUMENT

The question presented is of critical importance to the automotive industry, consumers and U.S. trade interests.

I. The automotive industry is a vital component of the global economy and plays an essential role in international trade. As a worldwide industry, it is a major force in global markets and brings immense benefits to U.S. manufacturers and U.S. consumers.

II. Harmonization of technical standards and enforcement is critical to the global auto industry because manufacturers sell their products to

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[2] U.S. law also allows California, with EPA approval, to set certain standards, and other states to adopt those standards. *See* 42 U.S.C. §§ 7543(b), 7507.

numerous countries with potentially divergent regulations. As a result, international efforts to achieve harmonization of vehicle regulations have long been recognized as important and have played a vital part in promoting the widespread availability of motor vehicles throughout the world. Illustrative of these are the work of the European Union and the United Nations. Both have developed frameworks that are based on the concepts of (1) uniformly-adopted technical regulations, and (2) reciprocal recognition systems under which a single approval authority is responsible for regulating manufacturers from initial application through the life of the vehicle.

These approaches provide a useful comparison to the U.S. solution for addressing potential conflicts among federal, state, and local regulators in the area of vehicle emission systems: federal preemption that centralizes regulation and enforcement in EPA. While the governmental approaches differ, they share the common goal of a single regulatory standard interpreted and enforced by a single governmental authority.

III. The Ninth Circuit's decision threatens to undermine regulatory harmonization because it abandons the principle of a single regulatory standard enforced by a single regulator. Instead, global auto manufacturers face the unprecedented situation of being subject to regulation and enforcement actions by thousands of state and local governments with different views, approaches, and priorities.

If the Ninth Circuit's decision is allowed to stand, the resulting regulatory patchwork would cause myriad adverse effects on manufacturers, consumers, and the environment. Manufacturers would face staggering potential liability; consumers would face confusion, higher vehicle prices, and restricted vehicle

choices; and the environment would suffer as manufacturers may avoid or delay improving their emission systems. Global manufacturers also fear that regulation by multiple state and local regulators could give rise to discrimination and arbitrary enforcement, which is avoided when EPA serves as the United States' exclusive regulator.

The petition should be granted.

ARGUMENT

Petitioners amply demonstrate that the Ninth Circuit's decision conflicts with final decisions of several state courts and that the federal Clean Air Act ("CAA") preempts respondents' claims. See Pet. 14-16, 22-34. *Amici* will not repeat those arguments here. Instead, *amici* submit this brief to support petitioners' arguments that the question presented is exceptionally important and of critical significance to the automotive industry. See *id.* at 16-22. *Amici* agree with petitioners' arguments (and with the analysis presented below by auto industry *amici*) that the decision below will disrupt the industry.[3] *Amici* write separately in order to underscore the importance of the question presented to the global automotive

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[3] *See* Brief of The Alliance of Automobile Manufacturers, Inc., The Association of Global Automakers, and The Chamber of Commerce of the United States of America as *Amici Curiae* in Support of Affirmance and Appellees, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 18-15937 (9th Cir. Dec. 13, 2018), ECF No. 34; Brief of The Alliance for Automotive Innovation and Chamber of Commerce of the United States of America as *Amici Curiae* in Support of Appellees' Petition for Panel Rehearing or Rehearing En Banc, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 18-15937 (9th Cir. Aug. 10, 2020), ECF No. 79 (hereinafter Rehearing Amicus Br.).

manufacturing industry and community. They provide their perspective that the harmful effects of the Ninth Circuit's decision—if allowed to stand—will extend to all U.S. and non-U.S. members of the auto industry and will adversely impact the United States' international trade.

I. THE AUTOMOTIVE INDUSTRY IS CRITICAL TO THE GLOBAL ECONOMY.

To provide background and context for the analysis that follows, it is helpful to understand the importance of the auto industry to the global economy and its vital role in the United States' trade with other countries.

The auto industry is a major force in the world economy. Global auto industry revenue was estimated at $5.3 trillion in 2017 and has been projected to reach nearly $9 trillion in 2030.[4] In 2019, approximately 92 million motor vehicles were produced worldwide.[5] China is the world's largest producer (28.2% market share in 2019), followed by Europe (23.8%), North America (18.2%), and Japan/Korea (14.4%).[6] For numerous countries in the world, including the United States, the auto industry is a major source of employment, tax revenue, and technology investment.

With respect to the European Union ("EU"), the auto sector accounts for 7% of the EU's GDP, and includes 226 vehicle assembly and production plants that

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[4] *See Global Automotive Industry Revenue Between 2017 and 2030*, Statista (June 2019), https://www.statista.com/statistics/574151/global-automotive-industry-revenue.

[5] ACEA, *The Automobile Industry Pocket Guide 2020/2021*, at 15 (July 2020), https://acea.be/uploads/publications/ACEA_Pocket_Guide_2020-2021.pdf.

[6] *Id.*

produce 18.5 million vehicles per year.[7] This sector accounts for 6.7% of all EU jobs, and 11.5% of EU manufacturing jobs.[8] The EU's number one investor in research and development is the auto sector, responsible for 29% of such spending.[9]

Because the auto industry is worldwide in scope, it plays a vital role in international trade with the United States. The United States is a principal destination for vehicles and vehicle components produced in other countries. In 2017, for example, the dollar value of vehicles and vehicle parts imported to the United States was over $340 billion, and 48% of all vehicles sold in the United States were imported.[10] Correspondingly, the United States exports vehicles and parts to 212 countries, and such exports totaled more than $122 billion in 2019.[11]

With respect to the EU, the EU auto industry accounts for approximately 10% of total trade between the EU and the United States.[12] The United States is the number one destination of EU car exports, in terms

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[7] *See Facts About the Automobile Industry*, ACEA, https://www.acea.be/automobile-industry/facts-about-the-industry (last visited Feb. 11, 2021).

[8] *Id.*

[9] *Id.*

[10] Michael Schultz et al., Ctr. for Auto. Research, *U.S. Consumer & Economic Impacts of U.S. Automotive Trade Policies* 3 (Feb. 2019) (hereinafter CAR Report), https://www.cargroup.org/wp-content/uploads/2019/02/US-Consumer-Economic-Impacts-of-US-Automotive-Trade-Policies-.pdf.

[11] *See The Industry*, All. for Auto. Innovation, https://www.autosinnovate.org/initiatives/the-industry (last visited Feb. 11, 2021).

[12] *See USA*, ACEA, https://www.acea.be/industry-topics/tag/category/usa (last visited Feb. 11, 2021).

of both units (21.3% share of EU exports in 2016) and value (30.2% share).[13] Correspondingly, 19% of cars imported into the EU come from the United States.[14]

U.S. automakers benefit immensely from this trade. In addition to the sales revenue from exports, trade "enables the U.S. automotive and parts industries to be globally competitive. Because of international commerce, the U.S. industry can specialize in areas where it has a comparative advantage and achieve greater economies of scale."[15] U.S. consumers likewise benefit from this trade, "both because there is a greater selection of models in the market, and because trade helps to keep new vehicles affordable."[16]

II. HARMONIZATION OF STANDARDS AND ENFORCEMENT IS CRITICAL TO THE GLOBAL AUTO INDUSTRY.

Global auto manufacturers face a fundamental challenge in operating their businesses. Mass production and global sales are critical to their economic success, but they "are faced with a wide variety of different regulations in different countries, often aimed at achieving the same purpose, but differing for historical reasons."[17] Because it is not feasible for manufacturers to produce different versions of their products (or different versions of post-sale modifications) for a multitude of different

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[13] *Id.*

[14] *Id.*

[15] CAR Report, *supra* note 10, at 5.

[16] *Id.* (noting that in 2017, 117 vehicle models were produced in the United States, but 354 were available to consumers).

[17] *Worldwide Harmonization*, Int'l Org. of Motor Vehicle Mfrs., https://www.oica.net/category/worldwide-harmonization/ (last visited Feb. 11, 2021).

markets, "[h]armonization of vehicle regulations is important to the Auto Industry."[18] It also benefits consumers because regulatory harmonization results in efficiencies and costs savings that yield "lower costs and prices and a wider choice of vehicles available to all consumers."[19]

To understand the potential impacts of the Ninth Circuit's decision, it is helpful to examine some of the international efforts to achieve harmonization of vehicle regulations, and how those compare to the analogous U.S. approach of creating uniformity within the United States by preempting state and local regulation.

A. The European Union.

As far back as 1970, the European Economic Community (predecessor to the European Union) recognized that applying different technical requirements to vehicle manufacturers "hinder[s] trade."[20] As a result, the European Communities enacted Directive 70/156/EEC, which "introduce[d] a

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[18] *Id.*

[19] *Id.* A 2016 report estimated that regulatory divergence in safety regulations between the United States and the European Union alone cost manufacturers between $3.3 billion and $4.2 billion in 2014. Ctr. for Auto. Research, *Potential Cost Savings and Additional Benefits of Convergence of Safety Regulations Between the United States and the European Union*, at ii, 10-11 (July 2016), https://www.cargroup.org/wp-content/uploads/2017/02/Potential-Cost-Savings-and-Additional-Benefits-of-Convergence-of-Safety-Regulations-between-the-United-States-and-the-European-Union.pdf. That amount does not include the additional cost of complying with divergent emission regulations, which "could be 50 percent or more of the total compliance cost." *Id.* at v, 23.

[20] Council Directive 70/156/EEC, pmbl., 1970 O.J. (L 42), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31970L0156&from=EN.

Community type-approval procedure for each vehicle type."[21] This procedure allowed Member States to grant type-approval to vehicles, which other Member States would reciprocally recognize, thereby avoiding the need for manufacturers to obtain multiple approvals in different countries. The system has evolved over the years, becoming more detailed and centralized with each amendment, but the basic principles of type-approval and reciprocal recognition have endured as a way to achieve harmonization. The most recent version of the EU's harmonized type-approval process is reflected in EU Regulation 2018/858, which went into effect in September 2020.[22]

Regulation 2018/858 is designed to "improve the enforcement of the framework for type-approval by harmonising and enhancing the type-approval procedures and conformity of production procedures applied by Member States' authorities."[23] A critical component of the EU's harmonization has been adoption of the same technical regulations applicable in all Member States. But merely adopting the same technical regulations was deemed insufficient to ensure harmonization and minimize regulatory divergence costs. The EU therefore also adopted a type-approval reciprocal recognition system under which a single approval authority (sometimes with

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[21] *Id.*

[22] Commission Regulation 2018/858, 2018 O.J. (L 151), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R0858&from=en. "Type-approval" is "the procedure whereby an approval authority certifies that a type of vehicle, system, component or separate technical unit satisfies the relevant administrative provisions and technical requirements." *Id.* art. 3(1).

[23] *Id.* pmbl. (4).

oversight from the European Commission) is responsible for regulating manufacturers from initial application through the life of the approved vehicle.

Thus, each Member State appoints an "approval authority" responsible for analyzing applications and granting type-approvals.[24] A manufacturer can choose to apply to any Member State's approval authority, but it need apply to only one. If the vehicle that is the subject of the application complies with EU regulations, the approval authority grants type-approval.[25] Then, all other Member States must recognize that type-approval.[26] As a result, a vehicle manufacturer need only undergo testing and obtain approval from a single country, rather than incur the time and expense of repeating the process in multiple countries. Centralized approval of vehicles in a single Member State also avoids situations in which countries impose different interpretations of the same regulation, which might require a manufacturer to make changes to vehicles sold in different countries.

The approving Member State's obligations do not, however, end with granting type-approval. The EU recognized the importance of a single regulator retaining responsibility. Thus, the approving authority is responsible for ensuring compliance with regulations throughout the life of the vehicle. For example, the approving authority must enforce conformity of production requirements—the vehicles, systems, or components actually produced must conform to the type of vehicle as was submitted to the

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[24] *Id.* art. 7.

[25] *See id.* arts. 6-7.

[26] *See id.* art. 6.

approval authority and approved by that entity.[27] If the manufacturer fails to maintain conformity of production, as determined by the approval authority, it is only that approval authority's obligation to require corrective action or withdraw the approval. The manufacturer must also "inform the authority that has approved its type of vehicle of any changes to the characteristics of the type,"[28] and only that authority is responsible for any amendments to the approval.[29] Further, the approving authority is responsible for ensuring in-service conformity of approved vehicles, *i.e.*, that approved and produced vehicles remain in compliance with applicable regulations throughout their useful lives.[30]

In fact, until September 2020, Member States had practically no ability to second-guess or review a type-approval issued by a different Member State, whether pre- or post-sale. This served important objectives of the system because different Member States have interpreted the same EU vehicle regulations in different ways,[31] and it would defeat the purposes of

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[27] *Id.* art. 31.

[28] *Id.* pmbl. (43).

[29] *Id.* art. 33.

[30] *See* Commission Regulation 2017/1151, art. 9, 2017 O.J. (L 175), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1151&from=EN.

[31] European Parliament Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, *Legal Obligations Relating to Emission Measurements in the EU Automotive Sector*, at 39-40, Doc. No. IP/A/EMIS/2016-02, PE 578.996 (June 2016) (hereinafter Legal Obligations), https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578996/IPOL_STU(2016)578996_EN.pdf ("Although the 28 type-approval authorities are coordinated within a type-approval

harmonization if a manufacturer had to satisfy every Member State's differing interpretation of the same regulation. At the same time, the EU recognized that allowing a single Member State's interpretation to govern approval throughout the EU incentivized manufacturers to flock to Member States with less strict interpretation and enforcement for their type-approvals.[32] Other Member States were largely unwilling or unable to take action, which in turn discouraged Member States from operating market surveillance programs intended to identify non-compliance.[33]

Regulation 2018/858 was an attempt to balance those competing interests by ensuring that vehicle regulations are properly enforced, while at the same time preserving the principle that a manufacturer is bound by only a single regulatory interpretation applicable throughout the EU. To accomplish that

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authority expert group at European level, the national frameworks for the activities of the technical services vary for a number of reasons, including differences in the interpretation of the European provisions. . . . This may result in major disparities in the design and quality of testing within the same European type-approval process . . . .").

[32] European Parliament Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, *Comparative Study on the Differences Between the EU and US Legislation on Emissions in the Automotive Sector*, at 10, Doc. No. IP/A/EMIS/2016-02, PE 587.331 (Dec. 2016) (hereinafter Comparative Study), https://www.europarl.europa.eu/RegData/etudes/STUD/2016/587331/IPOL_STU(2016)587331_EN.pdf ("[M]anufacturers make maximum use of permitted flexibilities; and exploit the scope for choosing type approval authorities they perceive to be more favourable."); *id.* at 32 (describing EU's previous system of "little or no central oversight" as "a key weakness of the EU system").

[33] Legal Obligations, *supra* note 31, at 33.

goal, the EU instituted a "compliance verification" program in which the Commission occasionally conducts its own testing to validate that vehicles with type-approval are in compliance.[34] Additionally, all Member States must now appoint "market surveillance authorities" with the duty to "carry out regular checks to verify that vehicles, systems, components and separate technical units comply with the relevant requirements."[35]

These additional enforcement mechanisms bolster regulatory compliance, but do not alter the regulatory harmonization and reciprocal recognition principles that are at the core of the EU system. If a Member State that did not grant the type-approval discovers a violation or non-compliance, it has limited authority to demand corrective action or even refuse to recognize that approval. And even then, it can exercise such authority only temporarily, while the Member State that granted the type-approval considers what action, if any, to take.[36] It remains the case that only the Member State granting the type-approval retains the authority to withdraw the type-approval.[37] If there is a dispute between Member States about a vehicle's compliance, the European Commission settles the dispute, and its determination is binding on all Member States.[38]

By adhering to the principles of regulatory harmonization and reciprocal recognition, through the entire life of the vehicle, the EU system minimizes

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[34] EU Regulation 2018/858, art. 9.

[35] *Id.* art 8(1).

[36] *See id.* ch. XI.

[37] *Id.* art. 54(2).

[38] *See id.* art. 54(3)-(5).

regulatory divergence and enforcement costs. It also ensures that manufacturers are subject only to a single regulator and a single interpretation of regulations, recognizing that it makes sense for the same authority both to approve the initial design and to decide whether the design continues to comply with applicable regulations throughout the vehicle's useful life.

B. The UN/ECE World Forum For Harmonization Of Vehicle Regulations (WP.29).

The EU is not the only multi-national organization that has recognized the value of regulatory harmonization in the automotive industry and taken steps to achieve it. The United Nations, through the UN/ECE World Forum for Harmonization of Vehicle Regulations (WP.29), recognizes that "international harmonization through UN Regulations and UN [Global Technical Regulations (GTRs)] concerning the construction and functioning of motor vehicles is an essential factor in reducing the regulatory costs for all manufacturers and enhancing competitiveness."[39] Accordingly, the UN has adopted and implemented regulations designed to achieve that goal.

The cornerstone of the UN's vehicle regulation harmonization work is the Agreement Concerning the Adoption of Harmonized Technical United Nations Regulations for Wheeled Vehicles, Equipment and Parts Which Can Be Fitted and/or Used on Wheeled Vehicles and the Conditions for Reciprocal Recognition

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[39] U.N. Economic Commission for Europe, *World Forum for Harmonization of Vehicle Regulations (WP.29): How It Works – How to Join It*, at 125, U.N. Doc. ECE/TRANS/289 (4th ed. 2019) (hereinafter Bluebook), https://unece.org/sites/default/files/2020-12/WP29-BlueBook-4thEdition2019-Web_0.pdf.

of Approvals Granted on the Basis of These United Nations Regulations ("the 1958 Agreement").[40] The 1958 Agreement "was originally designed to facilitate the free movement and sale of wheeled vehicles across State borders within the region of Europe," by "reduc[ing] the burden of repetitive regulatory testing and certifications."[41] After its adoption, amendments "expand[ed] its scope of activities" even further and "attract[ed] the participation of countries outside the original European region, i.e. from other parts of the world."[42] The 1958 Agreement currently has over 60 Contracting Parties, representing countries spanning the globe, and has spawned over 150 Regulations.[43]

Under the 1958 Agreement, UN Regulations establish applicable standards, which automatically enter into force for each Contracting Party, absent a timely objection.[44] Any Contracting Party enforcing the UN Regulation may grant relevant "type-approvals" with respect to that Regulation. Similar to the EU's system, other Contracting Parties applying the UN Regulation must then grant reciprocal recognition of that approval.[45]

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[40] U.N. Doc. E/ECE/TRANS/505/Rev. 3 (Oct. 20, 2017) (hereinafter 1958 Agreement), https://unece.org/fileadmin/DAM/trans/main/wp29/wp29regs/2017/E-ECE-TRANS-505-Rev.3e.pdf.

[41] Bluebook, *supra* note 39, at 18.

[42] *Id.*

[43] U.N. Economic and Social Council, *Status of the Agreement, of the Annexed UN Regulations and of Amendments Thereto*, at 10-18, U.N. Doc. ECE/TRANS/WP.29/343/Rev.28 (Feb. 28, 2020), https://unece.org/fileadmin/DAM/trans/main/wp29/wp29regs/2020/ECE-TRANS-WP.29-343-Rev.28.pdf.

[44] Bluebook, *supra* note 39, at 8-9.

[45] *Id.* at 9; *see* 1958 Agreement, *supra* note 40, art. 3.

Importantly for purposes of the question presented in the petition, the country that grants the type-approval is also responsible for post-approval regulation, including, for example, conformity of production procedures and in-service compliance tests.[46] If a Contracting Party identifies any non-compliance, it must "advise the approval authority of the Contracting Party which issued the approval," and it is the latter approval authority that must "take the necessary steps to ensure that the non-conformity is rectified."[47]

UN Regulations even contemplate coverage of post-sale software updates. A recently enacted UN Regulation provides for the type-approval of Software Update Management Systems.[48] As part of that type-approval, the manufacturer must have a process in place by which it identifies whether a software update will affect a previously type-approved system.[49] If a modification affects technical performance and/or

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[46] 1958 Agreement, *supra* note 40, art. 2(1); Commission Regulation 2019/253, sec. 9, 2019 O.J. (L 45), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42019X0253&from=EN.

[47] 1958 Agreement, *supra* note 40, art. 4(1).

[48] U.N. Economic and Social Council, *Proposal for a New UN Regulation on Uniform Provisions Concerning the Approval of Vehicles with Regards to Software Update and Software Updates Management System*, U.N. Doc. ECE/TRANS/WP.29/2020/8080 (Mar. 31, 2020) (hereinafter Proposal), https://unece.org/fileadmin/DAM/trans/doc/2020/wp29/ECE-TRANS-WP29-2020-080e.pdf; U.N. Economic Commission for Europe, *UN Regulations on Cybersecurity and Software Updates to Pave the Way for Mass Roll Out of Connected Vehicles* (June 24, 2020), https://unece.org/press/un-regulations-cybersecurity-and-software-updates-pave-way-mass-roll-out-connected-vehicles.

[49] Proposal, *supra* note 48, § 7.1.1.8.

required documentation, the manufacturer must notify the approval authority that originally granted the type-approval, and that authority takes appropriate action, including issuing an extension of approval if necessary.[50]

The 1958 Agreement has been a boon to vehicle and vehicle component manufacturers, as it has eliminated the need to receive approval from multiple authorities and ensures that manufacturers must comply with only a single interpretation of the applicable regulations. In fact, the UN Regulations issued under the 1958 Agreement have been so successful that the EU has decided to replace as many EU Directives as possible with UN Regulations, further harmonizing vehicle regulations on an international scale.[51]

Even countries that are not yet prepared to grant the reciprocal recognition envisioned by the 1958 Agreement have recognized the importance of international harmonization of vehicle regulations. Many such countries—including the United States—have signed on to the Agreement Concerning the Establishing of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts Which Can Be Fitted and/or Be Used on Wheeled Vehicles ("the 1998 Agreement").[52] The 1998 Agreement is similar to the 1958 Agreement in that it acknowledges many of the same goals and values. Part of the Agreement's goal is to develop a process that "promote[s] the harmonization of existing technical regulations,"

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[50] *Id.* § 8.

[51] Bluebook, *supra* note 39, at 8.

[52] U.N. Doc. ECE/TRANS/132 (June 25, 1998) (hereinafter 1998 Agreement), https://unece.org/DAM/trans/main/wp29/wp29wgs/wp29gen/wp29glob/tran132.pdf.

recognizing "the potential value to international trade, consumer choice and product affordability of increasing convergences in existing and future technical regulations and their related standards."[53] Its express purpose is to "reduce technical barriers to international trade through harmonizing existing technical regulations of Contracting Parties, and UN/ECE Regulations" under the 1958 Agreement.[54] The 1998 Agreement currently has 38 Contracting Parties—the first of which was the United States—and has issued over 20 UN Global Technical Regulations.[55]

The 1998 Agreement is similar to the 1958 Agreement, except that the Contracting Parties adopt UN Global Technical Regulations—not UN Regulations; they do so by consensus—not four-fifths vote; and the Contracting Parties that adopt a UN Global Technical Regulation are not required to grant reciprocal recognition to type-approvals granted by other countries. Still, the 1998 Agreement performs a valuable harmonization function by encouraging Contracting Parties to adopt the same regulations.

The Contracting Parties to the 1998 Agreement have specifically recognized the importance of harmonization in emissions-related regulations, and accordingly, have issued a UN Global Technical Regulation. In doing so, the Contracting Parties noted that "compliance with different emission standards in

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[53] *Id.* pmbl.

[54] *Id.* art. 1.1.6.

[55] U.N. Economic and Social Council, *Status of the Agreement, of the Global Registry and of the Compendium of Candidates*, at 4-12, U.N. Doc. ECE/TRANS/WP.29/1073/Rev.27 (Mar. 3, 2020), https://unece.org/DAM/trans/doc/2020/wp29/ECE-TRANS-WP29-1073r27e.pdf.

each region creates high burdens from an administrative and vehicle design point of view," and concluded that both manufacturers and regulators could benefit from additional harmonization.[56]

While the 1998 Agreement is a weaker form of regulatory centralization, because it lacks reciprocal recognition, it nonetheless confirms the importance of minimizing regulatory divergence.

C. The EU And UN Systems, Like The U.S. System For Regulating Vehicle Emissions, Are Based On The Principle Of Accountability To A Single Regulator.

The EU and UN systems described above demonstrate that the goal of regulatory harmonization and the potential problems created by a multiplicity of vehicle regulators are not unique to the United States, which faces the potential for multiple vehicle regulators because of "Our Federalism." While there are a variety of approaches to addressing those issues, the common thread throughout is the importance of a single regulatory standard interpreted and enforced by a single governmental authority.

The EU and the UN pursue that objective by encouraging the adoption of uniform regulations by different countries and reciprocal recognition of type-approvals granted by other countries applying the same regulation. Importantly, though, the EU and UN do not allow regulatory centralization to end at initial approval of a vehicle. Instead, the systems they

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[56] U.N. Global Registry, *Addendum 19: Global Technical Regulation No. 19 on the EVAPorative Emission Test Procedure for the Worldwide Harmonized Light Vehicles Test Procedure (WLTP EVAP)* ¶ 2, U.N. Doc. ECE/TRANS/180/Add. 19 (Aug. 25, 2017), https://unece.org/fileadmin/DAM/trans/main/wp29/wp29wgs/wp29gen/wp29registry/ECE-TRANS-180a19e.pdf.

created ensure that the same regulatory authority that initially grants the type-approval remains responsible for enforcement throughout the life of the vehicle, even post-sale. Regulatory authority is not centralized in a single body, as with EPA in the United States. Instead, it is shared among several bodies, at least until a manufacturer selects one authority to which to apply for approval—but it is nonetheless harmonized by limiting the ability of authorities other than the one that granted the approval to take enforcement action. Notably, the EU and UN systems do not distinguish between pre-sale and post-sale regulation, recognizing the importance of harmonization and a single regulator throughout a vehicle's life.

The United States took a different path to harmonization with respect to vehicle emission systems. Rather than allowing a multiplicity of regulatory authorities (such as states and other political subdivisions) to grant approvals and require reciprocal recognition, Congress created a single approval authority—EPA—through the CAA's preemption provisions. Of course, as described in the petition, states retain limited authority to regulate how cars operate post-sale, such as by creating carpool lanes. See Pet. 28-31. But giving states the broad post-sale authority envisioned by the Ninth Circuit's decision would destroy the United States' approach to regulatory centralization of vehicle emission systems. It would create the very situation the EU, UN, and U.S. systems were all designed to avoid: subjecting manufacturers to multiple regulators with differing, and almost certainly conflicting, interpretations of applicable regulations.

III. THE NINTH CIRCUIT'S DECISION THREATENS TO UNDERMINE REGULATORY HARMONIZATION AND CAUSE MASSIVE DISRUPTION IN THE GLOBAL AUTO INDUSTRY.

Viewed against this backdrop of national and international efforts to harmonize standards and enforcement in the global auto industry, the Ninth Circuit's ruling is a bombshell that threatens fundamentally to alter the regulatory environment faced by global automakers. Until this ruling, global automakers—who already face the daunting challenge of different regulations in different countries—have been able to rely and depend upon the fact that EPA is the exclusive U.S. regulator of vehicle emission systems through the useful life of their vehicles, *i.e.*, both pre-sale and post-sale. They likewise have been able to rely upon the fact that EPA is the exclusive enforcer of U.S. regulations, such that consent decrees or other settlements with EPA have comprehensively resolved manufacturers' civil liability in the United States.

Under the Ninth Circuit's ruling, however, national uniformity in the United States would be at an end with respect to post-sale updates. Instead, global automakers would face regulation and enforcement actions by all 50 U.S. states and thousands of political subdivisions, based upon their endlessly varied and unpredictable local views, approaches, and priorities. The prospect of auto manufacturers being subject to different local regulations for emission systems within a country would be unprecedented. The Ninth Circuit's decision would also create vast confusion for consumers, who could face conflicting standards for their emission systems and uncertainty in how to comply with the multiple standards.

In addition, EPA's deep technical expertise in vehicle emission systems and its decades of experience in assessing the tradeoffs inherent in system updates, see Pet. 4, 11, would be displaced by regulation and enforcement by local decisionmakers who lack such expertise and experience. Local decisionmakers would effectively be able to veto EPA-approved updates and EPA's carefully calibrated enforcement penalties by imposing massive additional penalties. See Pet. App. 77a-78a (noting that potential penalties imposed by U.S. states and local governments could "dwarf those paid to EPA" and undermine "the congressional calibration of force" for emission-system tampering); *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 380 (2000) ("[C]onflict is imminent when two separate remedies are brought to bear on the same activity.") (internal quotations omitted; alteration in original).

The regulatory patchwork and disorder resulting from the Ninth Circuit's decision would cause myriad adverse effects on manufacturers, consumers, and the environment. *First*, as the Ninth Circuit acknowledged, its decision raises the prospect of "staggering liability" for auto manufacturers who sell their products in the United States. Pet. App. 45a; see also *id.* at 3a (recognizing that ruling may result in "unexpected (and enormous) liability"). Global manufacturers could not practicably avoid this potential liability by seeking approval of their post-sale updates by thousands of state and local governments. As a result, they might be forced to increase the price of their vehicles in the United States to account for the increased liability risk, or even avoid U.S. markets altogether. This would harm U.S. consumers, who might no longer enjoy the wide choice of vehicles at competitive prices that has resulted from global regulatory harmonization.

Second, the Ninth Circuit's decision could cause manufacturers to avoid or delay improving their emission systems—to the detriment of consumers and the environment—for fear that state or local authorities would construe the improvements as improper "tampering." Manufacturers would certainly resist EPA requests that they take voluntary actions to modify their emission systems, based on the same fear of lawsuits by state or local government officials who might take a different view of the EPA-approved modifications. As petitioners' *amici* explained below, under many anti-tampering laws, it is often difficult to determine whether a particular post-sale change could come within some regulator's interpretation of tampering. See Rehearing Amicus Br. at 11-13. If there is no exclusive regulator in the United States for post-sale updates, auto manufacturers cannot take the chance that performing updates which have been approved or even requested by EPA will provoke an avalanche of lawsuits by U.S. states and counties.

Third, global manufacturers fear that regulation by multiple state and local regulators could give rise to discrimination and arbitrary enforcement, which is avoided when EPA serves as the United States' exclusive regulator. Notably, one of the motivations for the EU system was that if EU Member States were to adopt conflicting standards and enforcement measures, they could use those enforcement measures to favor their domestic producers over imports from other countries.[57] In this regard, *amici* are concerned about and closely watching recent lawsuits in the United States brought by states and counties against

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[57] Comparative Study, *supra* note 32, at 12, 32 (explaining that EU type-approval "was initially aimed at ensuring that type approval systems at national level were not used as a means of protecting a Member State's own manufacturers").

non-U.S. manufacturers. Such actions include Hillsborough County's recent lawsuit against Daimler AG and threatened action against Fiat Chrysler Automobiles N.V., see Pet. 20-22, as well as the twelve pending lawsuits that have been filed by Texas counties against Fiat Chrysler, see *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices & Prods. Liab. Litig.*, MDL Dkt. No. 17-0307, Dallas County Cause No. DC-17-14447.

CONCLUSION

For the foregoing reasons and those set forth by the petitioners, the Court should grant the petition for a writ of certiorari.

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